# FEBRUARY 2016 MICHIGAN BAR EXAMINATION
# EXAMINERS' ANALYSES

## EXAMINERS' ANALYSIS OF QUESTION NO. 1

### Issue

This question raises the issue of whether Michigan Builders is liable for the boy's injuries under an attractive nuisance theory.

### Rule

A motion for summary disposition should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross Peters & Co*, 451 Mich 358 (1996).

In *Bragan v Symanzik*, 263 Mich App 324, 328 (2004), the court explained that:

> Landowners owe a heightened duty of care to known child trespassers. Normally, the only duty owed to a trespasser is to refrain from wanton and willful misconduct. Pursuant to the attractive nuisance doctrine, however, the landowner is liable for harm caused by a dangerous artificial condition located where children are known to trespass if children would not likely realize the danger and the owner fails to use reasonable care to eliminate a danger whose burden outweighs its benefit.

Michigan courts have adopted the test set forth by the Restatement of Torts 2d, §339. See *Pippin v Atallah*, 245 Mich App 136, 146 n 4 (2001), which provides that a premises owner is

liable for injuries to a reasonably foreseeable trespassing child if the following factors are established by the facts:

> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

"At the onset, liability under this rule is imposed only where the injury is caused by an 'artificial condition.'" *Murday v Bales Trucking, Inc*, 165 Mich App 747, 752 (1988).

Analysis

In reviewing the above factors, the applicant should conclude that plaintiff will likely be successful in proving each of the elements. With respect to (a), there is no doubt that Michigan Builders (through its foreman) knew that children were accessing the property, in particular making caves in the dirt hill, and were not permitted on the property. It is also clear that Michigan Builders knew, or minimally should have known, that creating these caves involved an unreasonable risk of death or serious injury. In fact, the foreman told the children to get off the property, and though he did not warn the boys of the dangers, one could argue the foreman's comments and actions create the implication that he knew it was dangerous for the boys to be making the caves. Thus, (b) is satisfied.

The action of these young elementary age children in coming back to the dirt pile and creating another cave, even in spite of the warning, satisfies section (c). Whether (d) is satisfied is more debatable. There are no facts describing the burden to remove the dirt, but one can presume that such a large pile would be expensive to move, and the facts say that much of the dirt will be used as "fill dirt" once the cement settles. Thus, there is a good argument that removing the dirt pile would be burdensome. Additionally, it could be argued that it would not have been burdensome to install a fence around the pile and hole. But, even if removal of the dirt or placing a fence around the perimeter was burdensome, the risk of injury to the children in building additional caves was substantial. Although nothing reveals any prior injuries or accidents from such conduct or from the existence of the dirt pile, the risk of a cave-in was significant given that they were digging at the base of a 15-foot high pile of dirt. Factor (d) is satisfied.

Finally, the evidence also satisfies section (e). The placement of a sign telling elementary age children to not trespass is a de minimis attempt to cure the known problem. Michigan Builders could have easily placed a secure tarp over the pile, reduced its size, or placed a guard on the premises to ward off any potential trespassers until the dirt was reused in a week.

## Conclusion

The applicant should conclude that the motion to dismiss should be denied because the evidence satisfies the elements necessary to establish that Michigan Builders created an attractive nuisance on its property.

## EXAMINERS' ANALYSIS OF QUESTION NO. 2

An "agency" is "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." *Logan v Manpower of Lansing, Inc*, 304 Mich App 550, 559 (2014)(internal quotation marks omitted). Here, an express agency relationship was created by the contract between Derwin (the principal) and Carolyn (the agent) for the express purpose of arranging Derwin's birthday party.

**Derwin's liability to Saucy Sean's** – "A principal is bound by the acts of an agent done within the scope of the agent's authority." *Hutton v Roberts*, 182 Mich App 153, 162 (1989). Therefore, an agent has a duty to comply with all lawful instructions received from the principal. *Burton v Burton*, 332 Mich 326, 337 (1952); *Cutter v Powers*, 200 Mich 375 (1918). If the agent fails to obey the principal's instructions, the agent is liable to the principal. *Cutter v Powers*, 200 Mich 375, 385-386 (1918); *Andrews v Hastings Mut Ins Co*, 40 Mich App 664 (1972). Derwin will be required to pay Saucy Sean's the contract amount, because Carolyn was acting within the scope of her agency when she contracted with Saucy Sean's.

**Derwin's liability to Exclusive Edibles** – Generally speaking, a principal may NOT be held liable for the acts of an agent that occurred prior to the commencement of the agency. *Polly v Charouhis*, 253 Mich 363, 366 (1931). However, if a person ratifies the unauthorized acts of another, and has received and accepted the benefits accruing from those acts, that person may be bound as a principal. *Langel v Boscaglia*, 330 Mich 655, 659 (1951); *Cudahy Bros Co v West Michigan Dock & Market Corp*, 285 Mich 18 (1938). In this situation, while Carolyn was not Derwin's agent at the time she ordered his birthday cake, Derwin's acceptance of the birthday cake and its consumption by the party attendees would constitute ratification. Therefore, Derwin is liable for the cost of the birthday cake.

Writer's Note: The doctrine of "ostensible agency" (apparent authority) is inapplicable under these facts and if an applicant raises and rejects its application, she/he should receive some credit. An agency is ostensible when the principal

causes a third person to believe another to be his or her agent where no agency actually exists. Three elements "are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence." *VanStelle v Macaskill*, 255 Mich App 1, 10 (2003). Here, because Derwin did not do anything that would cause Exclusive Edibles to reasonably believe that Carolyn Cook was acting on his behalf, an ostensible agency claim would fail.

**May Carolyn keep the $1000?** - An agent owes a duty of good faith to the principal "and is not permitted to act for himself at the principal's expense during the course of his agency." *Central Cartage Co v Fewless*, 232 Mich App 517, 525 (1998). Thus, "all profits made in the execution of a fiduciary's agency belong to the principal," and the agent has a duty to account to the principal. *Id.* An agent is not permitted to personally profit from the agency relationship except to the extent that the agreement permits it or the principal expressly assents. *Goldman v Cohen*, 123 Mich App 224, 230 (1983). Here, nothing in the facts indicate that the contract permitted Carolyn to keep the negotiated discount, nor do the facts indicate that Derwin expressly consented to it. Therefore, Carolyn may not keep the $1000.

## EXAMINERS' ANALYSIS OF QUESTION NO. 3

The examinee should recognize that the legal analysis Carlton provided to Donovan constitutes an attorney-client communication, the report prepared by Boothe may constitute work product, and Carlton's interview notes are likely to constitute work product. In addition, the examinee should recognize that, even if the Boothe report is work product, portions of the Boothe report and interview notes of the two residents who have been deployed to Afghanistan are likely discoverable. These issues are discussed separately below.

### 1. Carlton's Legal Analysis

The examinee should conclude that the court should deny Peters' motion to compel the production of Carlton's legal analysis to Donovan based on the attorney-client privilege.

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, *not privileged*, that is relevant to the subject matter involved in the pending case." *Augustine v Allstate*, 292 Mich App 408, 419 (2011) (emphasis added) quoting *Leibel v General Motors Corp*, 250 Mich App 229, 616 (2002). See also MCR 2.302(B)(1). "The attorney-client privilege attaches to direct communication between a client and his attorney. . . ." *Augustine*, 292 Mich App at 420 quoting *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618 (1998). See also *Leibel v General Motors Corp*, 250 Mich App 229, 236 (2002).

Here, Donovan hired Carlton after being advised by PI that it represented Peters in connection with the injuries he suffered after the balcony collapsed. Carlton's report to Donovan containing its legal analysis of the accident constituted a direct communication with Donovan to which the privilege attached. Thus, under *Augustine*, *Leibel*, and MCR 2.302(B)(1), discovery of Carlton's report is not permitted.

### 2. Interview Notes

The examinee should conclude that the court may grant Peters' motion to compel production of the interview notes of the witnesses deployed to Afghanistan. The court should deny

the motion to compel production of the remaining interview notes.

A. Applicability of Work-Product Privilege

The examinee should recognize that an attorney's interview notes of a witness are work product. *People v Holtzman*, 234 Mich App 166, 189 (1999). The examinee should also conclude that the interview notes were prepared in anticipation of litigation. Again, Donovan's immediate hiring of Carlton to lead the investigation into the cause of the accident was prompted by PI's letter, signifying that Donovan expected to be sued by Peters, wanted to begin preparing its defense, and hired a law firm to lead that effort. In turn, Carlton began preparing for that defense by interviewing residents of the apartment complex to determine who may have relevant information about the accident and capturing that information in notes. It does not matter that a specific claim had not yet arisen.

The examinee should receive extra points for recognizing that the more informal the interview notes are, the more difficult they are to discover. Under MCR 2.302(B)(3)(b) and (c), a person (whether a party or a nonparty) who made a formal statement, i.e., a written or recorded statement, may later obtain that statement in discovery without the showing of undue hardship, as discussed below. Thus, while Peters may not be able to discover directly the statements made by the residents of the apartment complex, he is free to ask any of the residents who made formal statements to request their statements from Carlton, who may then disclose them to Peters.

B. Substantial Need and Undue Hardship

With regard to the two apartment residents who were deployed to Afghanistan, the examinee should recognize that Peters has a substantial need for the interview notes and may face an undue hardship in locating and attempting to interview them in Afghanistan, and that, as such, the court should order disclosure of the factual, not deliberative, aspects of Carlton's interview notes for these two residents. See *Augustine*, 292 Mich App at 421; MCR 2.302(B)(3)(a). An examinee may also receive extra points for recognizing that if those residents returned from Afghanistan on leave and were available to be interviewed locally, Peters may be unable to show undue hardship.

Finally, the examinee should conclude that the court should deny Peters' motion to compel the production of the remaining witness interview notes, as nothing in the facts identifies any undue hardship to Peters in locating and interviewing the other apartment residents. See *Messenger,* 232 Mich App at 638.

3. Boothe Report

The examinee should conclude that the court may grant Peters' motion to compel production of portions of the Boothe report.

A. Applicability of Work-Product Privilege

"[W]ork product is cloaked with a qualified immunity without regard to whether [it was] prepared by an attorney or by some other person and whether such other person was engaged by an attorney." *D'Alessandro Contracting Group, LLC v Wright,* 308 Mich App 71, 77-78 (2014)quoting *Leibel v Gen Motors Corp,* 250 Mich at 245 (citations omitted). "[T]he doctrine does not require that an attorney prepare the disputed document only after a specific claim has arisen." *D'Alessandro* at 78 quoting *Leibel,* 250 Mich App at 246 (citations omitted). "The doctrine does require, however, that the materials subject to the privilege pertain to more than just 'objective facts.'" *D'Alessandro* at 78. MCR 2.302(B)(3)(a) provides:

> Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

First, the examinee should recognize that expert reports may constitute work product. However, the court may need to conduct an in-camera inspection to determine whether any parts, i.e., objective facts, are not subject to the work-product protection. See *D'Alessandro*, 308 Mich App at 80.

The examinee should also determine from the facts that the Boothe report was prepared in anticipation of litigation. Donovan's immediate hiring of Carlton to lead the investigation into the cause of the accident was prompted by PI's letter, which signifies that Donovan expected to be a defendant in a lawsuit filed by Peters, wanted to begin preparing its defense, and hired a law firm to lead that effort. In turn, Carlton began preparing for that defense by hiring a consultant, Boothe, to opine how the balcony collapsed. It does not matter that a specific claim had not yet arisen.

B. Substantial Need and Undue Hardship

Second, the examinee should identify that because the balcony was reconstructed after Boothe's report was prepared, the best evidence as to why the balcony collapsed would likely not be available to Peters in bringing his action against Donovan. Thus, any investigator hired by Peters to develop a theory of negligence against Donovan would be significantly hampered in its investigation of the cause of accident. These facts establish a substantial need for and an undue hardship to Peters in obtaining the substantial equivalent of the Boothe report, thus warranting a limited breach of the work-product privilege to compel production of the Boothe report. MCR 2.302(B)(3)(a). Therefore, to the extent the Boothe report is work product, the court should order Donovan to disclose the factual, not deliberative, aspects of the Boothe report, meaning any conclusions about the cause of the accident or recommendations for future construction Boothe may have stated in its report, should be protected from disclosure, while only the detailed structural findings Boothe made as it investigated in the aftermath of the balcony collapse would be subject to production. See *Augustine*, 292 Mich App at 421; MCR 2.302(B)(3)(a).

An examinee may receive extra points for articulating that Donovan may credibly argue that until Peters definitively demonstrates that its expert is unable to render an opinion without reviewing the Boothe report, Peters has failed to establish an undue hardship warranting disclosure of the report.

The examinee could propose that Donovan might challenge Peters' claim of undue hardship by indicating that a representative of Boothe will be listed as an expert witness for Donovan. See MCR 2.302(B)(4). Thus, the examinee may credibly argue that even if Peters claims he will face an undue hardship in learning certain factual aspects of Boothe's report without disclosure of the report, Donovan can maintain that Peters may propound interrogatories and take a deposition to learn Boothe's opinions and the facts upon which those opinions rest. Thus, Peters may be unable to show a substantial need and the inability to obtain the information without undue hardship. See *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 638 (1998).

3. Boothe as a trial witness

An examinee may also receive extra points by recognizing that Boothe was clearly consulted in anticipation of litigation, and therefore, if he will not be a trial witness, discovery of his report is not permitted unless there has been a showing of exceptional circumstances such as the undue hardship in learning the facts. See MCR 2.302(B)(4)(b)(ii).

C. Disclosure of Work-Product to Insurer

An examinee should also receive points for discussing whether the distribution of the Boothe report to Ajax constitutes a waiver of the work-product privilege. Donovan may argue that its disclosure to its insurer cannot constitute a waiver because the court rule recognizes disclosure to an insurer as falling under the parameters of the privilege. See MCR 2.302(B)(3)(a). Peters can argue to the contrary that the rule requires that the report be prepared "by or for" the insurer. In this case, the report was only provided to Ajax after its preparation. See *D'Alessandro*, 308 Mich App at 82.

However, the common-interest doctrine prevents a disclosure to an insurer from constituting a waiver where there was a reasonable expectation of confidentiality. *D'Alessandro*, 308 Mich App at 82-84. Here, Donovan had a reasonable expectation of confidentiality in sharing the Boothe report with Ajax, particularly given that Ajax shared an interest in knowing the strengths and weaknesses of any potential litigation filed by Peters. Moreover, the disclosure did not substantially increase the risk of Peters obtaining the report. See *D'Alessandro*, 308 Mich App at 85-86.

## EXAMINERS' ANALYSIS OF QUESTION NO. 4

This UCC Article 9 Secured Transactions question primarily tests whether the examinee can recognize a Purchase Money Security Interest (PMSI), make a distinction among different PMSIs, and correctly determine the priority of competing security interests.

Article 9 of the UCC applies here because the three loans created security interests in Jamie's personal property (computer and/or conference table). MCL 440.9109(1) (a).

A security interest must attach to be enforceable. MCL 440.9203(1). Attachment occurs where: value has been given; the debtor has rights in collateral; the debtor grants the creditor security in the collateral; and, the parties sign a security agreement reasonably describing the collateral. MCL 440.9203(2). The question is designed such that the examinee should conclude attachment occurred with respect to each loan.

A security interest should be perfected. MCL 440.9308. Perfection can occur by filing a financing statement with the appropriate governmental agency, usually the Secretary of State. MCL 440.9501(1); MCL 440.9310. But, in some cases no financing statement need be filed because perfection is automatic upon attachment. MCL 440.9309.

Who perfected and when is the primary focus of the question. Priority will rest with the party who perfects or files first. MCL 440.9322 (1) (a).

A PMSI in consumer goods is automatically perfected upon attachment. MCL 440.9309(a). A PMSI is a particular type of secured interest, a security interest taken in a particular good to secure the purchase price of that good. MCL 440.9103. There is no PMSI automatic perfection for non-consumer goods, such as equipment. Instead, a financing statement is to be filed to perfect the security interest.

COMPUTER: Applying these rules here, Mike has first priority with respect to the computer. He has a PMSI in the computer. He loaned Jamie money to buy a specific computer; she used the money to buy it; she had granted him a security interest in her computer; their understanding was committed to a

signed agreement describing the collateral; and, she took immediate possession. The computer was for Jamie's "personal use." It was therefore a consumer good. A "consumer good" is a good used or bought "primarily for personal, family, or household purposes." MCL 440.9102(1)(w). Being a consumer good, Mike's PMSI perfected automatically upon attachment. The fact he did not file a financing statement does not matter.

Local Financing also has a perfected security interest in the computer. Its interest attached under the above attachment criteria and the company perfected by properly filing a financial statement. But, the financing company's interest is subordinate to Mike's automatically perfected PMSI in a consumer good.

CONFERENCE TABLE: Local Financing has priority with respect to the conference table. Office Supply has a PMSI in the table, but it was not perfected. Office Supply loaned Jamie money to buy it, she used the money to buy the table and granted Office Supply a security interest in the table. Their agreement was committed to a signed agreement identifying the table, and Jamie took possession. Unlike Mike's PMSI, however, Office Supply's PMSI did not perfect automatically. The table should be considered equipment for Jamie's business office, not a consumer good. "Equipment" means "goods other than inventory, farm products, or consumer goods." MCL 440.9102 (1)(gg). Jamie did not buy or use the large conference table for personal, family or household use, but instead for business use. MCL 440.9102(1)(w). Because there is no automatic perfection for equipment, Office Supply needed to file a financing statement to perfect, and they did not. Local Financing did perfect their security interest by filing an appropriate Financing Statement. Therefore, it has first priority.

## EXAMINERS' ANALYSIS OF QUESTION NO. 5

This question calls for a Michigan choice-of-law analysis. Under North Carolina's statute of repose, Pamela was required to file her lawsuit no later than June 2014 (i.e., 12 years after she purchased her vehicle). Yet under Michigan's 3-year statute of limitations, Pamela's lawsuit would be timely since it was filed within 3 years of the date of her accident. The issue is which law applies.

"In tort cases, Michigan courts use a choice-of-law analysis called 'interest analysis' to determine which state's law governs a suit where more than one state's law may be implicated." *Hall v General Motors Corp*, 229 Mich App 580, 585 (1998). "Although this balancing approach most frequently favors using the forum's (Michigan's) law, Michigan courts nonetheless use another state's law where the other state has a significant interest and Michigan has only a minimal interest in the matter." *Id.* Michigan courts "will apply Michigan law unless a 'rational reason' to do otherwise exists." *Id.* In determining whether a "rational reason" exists to apply another state's law, Michigan courts follow a two-step analysis:

> First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests. [*Id.*]

North Carolina has a substantial interest in having its law apply. Pamela lived and worked in North Carolina at the time of the accident, and received medical treatment there. As a result, she must be considered a North Carolina resident for purposes of a choice-of-law analysis. *Hall*, 229 Mich App at 591 ("[F] or Michigan choice-of-law analysis, a plaintiff's residency is determined as of the date of the injury, not as of the date of the filing of a lawsuit.") Moreover, her vehicle was purchased, registered, and insured in North Carolina.

Michigan's interest, on the other hand, is minimal. While Dendar is a Michigan corporation, and Pamela's vehicle was designed in Michigan, Dendar does business in all fifty states. Indeed, Pamela purchased her vehicle in North Carolina. Thus, it is in North Carolina's economic interest to encourage Dendar to continue to do business there by having its more restrictive statute of repose apply to a claim brought by one of its residents. "'Michigan has no interest in affording greater rights of tort recovery to a North Carolina resident than those afforded by North Carolina.'" *Hall*, 229 Mich App at 587, quoting *Farrell v Ford Motor Co*, 199 Mich App 81, 94 (1993).

Although the better answer is that the circuit court should determine that the law of North Carolina should apply, some credit will be given for a reasoned analysis concluding that the law of Michigan should apply. Finally, some credit may be given for recognizing the constitutional test for the permissible application of the law of either state.

While not necessary to achieve a perfect score, some credit may also be awarded for recognizing that this question also potentially implicates Michigan's "borrowing statute," MCL 600.5861, which provides:

> An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of this state the statute of limitations of this state shall apply.

Under the borrowing statute, "whichever statute of limitations time-bars a plaintiff's claim (i.e., the statute of the state where an injury occurs, or Michigan's statute) should apply," except when the plaintiff is a Michigan resident, in which case Michigan's statute of limitations will be applied. *Hall*, 229 Mich App at 592.

Arguably, the borrowing statute would not govern here because the statutory language suggests that it applies only to "statute[s] of limitation[s]," and not statutes of repose. However, it is not necessary to resolve that issue here. Since Pamela was a resident of North Carolina at the time of her

injury (i.e., when the "cause of action accrued in [her] favor"), she would be precluded from taking advantage of Michigan's more generous statute of limitations in any event. This is because the only time the borrowing statute requires application of Michigan's statute of limitations is when the plaintiff is a Michigan resident at the time of the injury. Thus, even if the borrowing statute governed, it would support application of North Carolina's more restrictive statute of repose in the same manner as Michigan choice-of-law analysis.

As a result, Dendar's motion for summary disposition should be granted.

## EXAMINERS' ANALYSIS OF QUESTION NO. 6

Frank should be told that a motion to change custody will need to be filed, served on Mary, and heard by the court. The court may not unilaterally change custody without a motion seeking a change in custody, and may not change custody without a hearing. *Schlender v Schlender*, 235 Mich App 230, 233 (1999). Therefore, a change of custody cannot be made by the court simply interviewing Grant.

### Procedural Process

A court does have jurisdiction to change prior custody provisions in a divorce judgment under the Child Custody Act, MCL 722.27(1)(C), but Frank must be told that his motion must establish proper cause or a change in circumstances, since entry of the judgment of divorce, or the court will have nothing to consider. A court must have a basis to re-evaluate a custody award, and should undertake a change in a custody award with caution. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509 (2003). Establishing proper cause or a change in circumstances is no small task.

"[P]roper cause means one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a re-evaluation of the child's custodial situation should be undertaken." *Vodvarka* at 511. While there is no hard and fast rule, the trial court can look to the twelve factors that articulate a child's best interest and ground its decision on proper cause in those factors, as they relate to the significance of the effect on the child's well-being. *Vodvarka* at 511-512.

As an alternative to "proper cause," Frank would have to demonstrate a "change in circumstances." The "movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka* at 513. "[N]ot just any change will suffice" because "over time there will always be some changes in a child's environment, behavior and well-being" and that the

evidence must amount to "something more than normal life changes (both good and bad) that occur during the life of a child. . ." *Id.*

In sum, interviewing Grant will be insufficient and Frank's motion, to proceed forward, must establish proper cause or a change in circumstances.

Should Frank establish this threshold requirement, the court must then determine if Frank or Mary has an established custodial environment with Grant. This determination is significant because it establishes the moving party's burden of proof. MCL 722.27(1)(c). As the statute states, "[t]he custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered." As to the burden of proof, the statute provides: "The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id.*, emphasis added.

Once the burden of proof is determined, Frank needs to prove it is in Grant's best interest to change custody. Determining Grant's best interest will involve analysis of the "best interest factors" under MCL 722.23. The court will be obligated to consider the 12 factors listed in the statute in determining Grant's best interest. *Arndt v Kasem*, 135 Mich App 252 (1984).

**Frank's chances for success**

These legal principles yield the conclusion that Frank's effort will be unsuccessful for a number of reasons. First, the single reason he wants to change custody – Grant is older and wants to live with him – is unlikely to comprise proper cause or a change in circumstances as those terms are defined in *Vodvarka*. While Frank's burden would only be a preponderance of evidence at this threshold stage, *Shann v Shann*, 293 Mich 302 (2011), Grant's desire will not establish proper cause or a

change in circumstances warranting the court to continue to consider Frank's request at an evidentiary hearing to change custody. *Killingbeck v Killingbeck*, 269 Mich App 132, 145 (2005). Not any change will do. See *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657-658 (2011).

Even if, however, the court found proper cause or a change in circumstances, the court would likely find an established custodial environment with Mary. The facts indicate Mary was the physical custodian of Grant at the time of divorce and for many years later. Frank's parenting time had never been increased. Mary was the parent who provided Grant's medical, educational and other needs, as well as his discipline. No changes had been made in that state of affairs for eight years, reflecting that Mary was the parent who would have the custodial environment with Grant. While Frank was not an absent father, his relationship with Grant cannot be characterized as having an established custodial environment with his son. Accordingly, he would have to demonstrate - by clear and convincing evidence - that it would be in Grant's best interest to change custody.

This burden would unlikely be carried by Frank. A child's express preference is a factor to consider under the best interest factors, 722.23(i), the reasonable preference of the child. However, it is but one factor that does not outweigh automatically all others. *Treutle v Treutle*, 197 Mich App 690 (1992). Frank has not even mentioned any of the other eleven factors, much less made out a case that he would prevail on any of those factors.

In sum, Frank would have to demonstrate by a preponderance of the evidence, proper cause or a change in circumstances to warrant re-evaluation of the best interest factors and would have to prove by clear and convincing evidence Grant's best interest would be served by a change. He is unlikely to prevail. The delineated process is designed to guard against an unwarranted custodial change and to minimize disruptive changes of custodial orders. See *Baker v Baker*, 411 Mich 567, 576-577 (1981).

## EXAMINERS' ANALYSIS OF QUESTION NO. 7

1. Larry's responses to Douglas:

This question raises two issues: promissory estoppel and anticipatory repudiation/breach.

*Promissory estoppel*

Douglas claims that there was no enforceable agreement to give Larry a ride. It is true that no contract was formed, as Larry offered no consideration in exchange for Douglas's promise to give him a ride. (Alternatively, no contract was formed because a material term—price—was missing.) However, Douglas's promise may be enforceable under the doctrine of promissory estoppel.

"Promissory estoppel . . . substitutes for consideration in a case where there are no mutual promises, enabling the promisee to assert a separate claim against the promisor. . . ." *Huhtala v Travelers Ins Co*, 401 Mich 118, 133 (1977). Under the doctrine of promissory estoppel, "'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" *State Bank of Standish v Curry*, 442 Mich 76, 83 (1993) (footnote omitted) (quoting Restatement (Second) of Contracts §90[1] [1981]). Consequently, "[t]he elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." *Schmidt v Bretzlaff*, 208 Mich App 376, 378-79 (1995), *appeal denied*, 451 Mich 931 (1996). Each of these elements will be examined.

(1) Promise: "'A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *State Bank of Standish*, 442 Mich at 85 (footnote omitted) (quoting Restatement, *supra*, §2). "[T]he sine qua non

of the theory of promissory estoppel is that the promise be clear and definite. . . ." *Id.* "To determine the existence and scope of a promise, we look to the words and actions of the transaction as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Id.* at 86. Here, Larry stated that without a ride, he would need to purchase an airline ticket. In response, Douglas "promised he would give Larry a ride." Although no price was agreed upon, Douglas's statement was more than merely an "expression . . . made in the course of preliminary negotiations when material terms of the agreement are lacking. . . ." *Id.* at 86 (internal quotation marks omitted). It was an explicit, "clear and definite" promise.

(2) Reasonably foreseeable reliance: "[T]he reliance interest protected by [Restatement §90] is *reasonable reliance*, and reliance is reasonable only if it is induced by an actual promise." *Id.* at 84 (internal quotation marks omitted). Here, Larry made clear that he would have to buy an airline ticket if Douglas did not give him a ride. In response, Douglas made "an actual promise" to give Larry a ride. Under these circumstances, Douglas "should reasonably have expected to induce action of a definite and substantial character on the part of [Larry]," *Schmidt*, 208 Mich App at 378--namely, that Larry would cancel plans to purchase an airline ticket.

(3) Actual reliance: The facts make clear that "Larry cancelled plans to purchase the ticket."

(4) Avoidance of injustice: "[P]laintiff must also show that enforcement of the promises are necessary to avoid injustice." *Hawkins v Peoples Fed Sav & Loan Ass'n*, 155 Mich App 237, 244 (1986). Under the facts of this case, the best conclusion is that enforcement of Douglas's promise is necessary to avoid injustice. Douglas initiated his interaction with Larry, knowing that Larry intended to fly to Florida; Douglas assured Larry that they could work out a deal that would save Larry money; and in response to Larry's request for assurance of a ride and Larry's clear indication that the ride would be in place of the flight, Douglas "promised" to give Larry a ride.

Moreover, Larry's reliance on Douglas's promise caused Larry damages. Under promissory estoppel, "The guiding principle in determining an appropriate measure of damages is to

ensure that the promisee is compensated for the loss suffered to the extent of the promisee's reliance." *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 173-74 (1997). Although the question does not ask examinees to calculate Larry's damages, the fact that he suffered damages is relevant in determining whether enforcement of the promise is necessary to avoid injustice. Because of Douglas's promise and subsequent anticipatory repudiation (discussed below), Larry had to pay $500 for his airline ticket--twice the price he would have had to pay had he not relied on Larry's promise.

*Anticipatory repudiation/breach*

Douglas claims that if he had an enforceable agreement with Larry, Larry breached the agreement by taking the flight. However, by repudiating the agreement the night before the drive, Douglas was the party who breached, giving Larry a claim for damages.

"Under the doctrine of anticipatory breach, if a party to a contract, prior to the time of performance, unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Paul v Bogle*, 193 Mich App 479, 493 (1992) (internal quotation marks omitted); see also *Brauer v Hobbs*, 151 Mich App 769, 776 (1986) (same). "Regarding oral repudiation, 'a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. . . .'" *Paul v Bogle*, 193 Mich App at 494 (quoting Restatement (Second) Contracts §250 cmt. b); see also *Washburn v Michailoff*, 240 Mich App 669, 673-74 (2000) ("[I]n order to invoke the doctrine, it must be demonstrated that a party to a contract *unequivocally* declared the intent not to perform."). "[U]nder Michigan law one party's complete repudiation of a contract is enough to establish breach." *Gardner v Heartland Indus Partners, LP*, 715 F 3d 609, 614 (6th Cir 2013).

"In order for a statement or an act to be a repudiation, the threatened breach must be of sufficient gravity that, if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach." Restatement §250, *supra*, at cmt. d. "It is a fundamental rule that a party may cease performance under a contract when the other party is in material

anticipatory breach." *Midfield Concession Enters, Inc v Areas USA, Inc*, 2015 WL 5472286, at *9 (ED Mich Sept 17, 2015). See also *Franconia Assocs v United States*, 536 US 129, 143 (2002) ("[A] repudiation ripens into a breach prior to the time for performance . . . if the promisee elects to treat it as such." [Internal quotation marks omitted.]); *D & S Mach Prods, Inc v Thyssenkrupp Bilstein of America, Inc*, 434 Fed App'x 446, 450 (6th Cir 2011) (same).

Here, the night before the time of performance, Douglas "told Larry he was canceling the trip." His repudiation was unequivocal--he did not, for example, merely tell Larry he was *thinking* of canceling, or that he *might* cancel in the morning if the weather was bad enough. Douglas's statement was of sufficient gravity to constitute a repudiation because a cancellation of the trip, if it occurred, would have given Larry a claim for damages for total breach. Larry therefore had the option to treat Douglas's repudiation as a breach of the agreement and to cease his own performance under the agreement.

2. Douglas's claim against Nina

This question raises two issues: condition precedent and waiver of condition.

*Condition precedent*

"[P]arties to a contract may by specific provision . . . make performance by one party a condition precedent to liability on the part of the other. . . ." *Knox v Knox*, 337 Mich 109, 117 (1953). "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. Whether a provision in a contract is a condition the non-fulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." *Id.* at 118 (internal quotation marks and citations omitted). See also *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 411 (2002) ("A 'condition precedent' is a condition that must be met by one party before the other party is obligated to perform. . . .")

The circumstances of this case make clear that Douglas and Nina agreed to a condition precedent: Nina's obligation to pay $50 for a ride was conditioned on Douglas's replacing the bald tire on his car prior to the trip. Because Douglas never replaced the tire, the condition was never fulfilled. Consequently, absent Nina's waiver (discussed below), Douglas's right to enforce the contract would not have come into existence, and Nina would not have been obligated to perform by paying Douglas $50.

*Waiver of condition*

"[W]here the promisor himself . . . waives the performance" of a condition precedent, "the performance of a condition precedent is discharged or excused, and the conditional promise [is] made an absolute one. . . ." *Mehling v Evening News Ass'n*, 374 Mich 349, 352 (1965). Here, Nina waived performance of the condition precedent by stating that the bald tire "won't be a problem" and proceeding to ride with Douglas. Nina's statement and actions discharged the condition precedent, making her promise to pay $50 for a ride absolute. Consequently, a court should hold that Nina owes Douglas $50.

*Quantum Meruit/Unjust Enrichment*

Alternatively, one could conclude that no contract was formed because Douglas failed to satisfy the condition. In that case, Nina could nevertheless be required to pay Douglas under an equitable theory of quantum meruit, unjust enrichment, quasi-contract or implied contract. "Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of another is required to make restitution to the other. The remedy is one by which the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received to ensure that exact justice is obtained." *Michigan Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 198 (1999) (internal quotation marks, brackets and citations omitted); *see also Kammer Asphalt Paving Co v E China Twp Sch*, 443 Mich 176, 185-86 (1993) (same).

## EXAMINERS' ANALYSIS OF QUESTION 8

The business transactions between Lawyer and his clients are covered by Michigan Rule of Professional Conduct (MRPC) 1.8(a).

MRPC 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> > (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
> > (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> > (3) the client consents in writing thereto.
> >
> > . . .

A client's loan to a lawyer is a transaction that is covered by this rule.[1]

***(1) Client A:***

The terms of the transaction with Client A are not fair and reasonable to the client. The interest rate is low and the repayment of the loan is unsecured. While the fairness and reasonableness of the interest rate may depend upon the other options available to the client for a return on investment of $30,000, the fact that the going rate for such loans was higher

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[1] See ABA comment for portion of MRPC 1.8(a) that is identical to the Model. See also, Jane Massey Draper, B.C.L., Annotation, *Disciplinary Action Against Attorney Taking Loan From Client*, 9 ALR 5th 193, 209-10 (1993); *Grievance Administrator v Eugene F. Williams*, DP 197/85 (ADB 1987) (Michigan Attorney Discipline Board opinion applying DR 5-104(A), predecessor to MRPC 1.8[a]).

should have affected the terms, i.e., the client should have received more interest. Also, regular payments before a balloon payment at the end would arguably be better for the client, especially in light of the other easy terms. Most important, however, is that the client's interests are unprotected because no collateral secures repayment of the loan.[2]

Additional points may be awarded to the candidate who discusses whether the minimal promissory note described in the question satisfies the requirement that the "transaction and terms" be "fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client." MRPC 1.8(a)(1). Merely disclosing the actual terms in the promissory note may be compliant with a technical reading of the rule. But disclosing the prevailing rates and the risk the client was taking by not having the loan collateralized would be more consonant with the purposes of "full" disclosure fostering client understanding of the transaction. A candidate may argue that the rule, as written, could be interpreted either way. Accordingly, spotting the issue and discussing it well should be recognized. (A similar discussion might occur in connection with the analysis of "consent" versus "informed consent" -- see discussion of the third element below.)

A reasonable opportunity to seek the advice of independent counsel as to the transaction must be afforded to the client. From the facts presented in the question, a candidate should at least raise the question whether the client had a reasonable opportunity to discuss the transaction with independent counsel. The solicitation for the loan and the client's assent happened almost instantly, and a promissory note was given for the cash the next morning because Lawyer wanted to move quickly. Points may be awarded for the candidate who recognizes that Michigan's rule, unlike the Model Rule, does not require that the client be "advised in writing of the desirability of seeking" counsel.

The final element of the rule is that "the client consents in writing thereto," i.e., to the terms of the transaction. Clearly, this element has not been met. There were no loan documents other than the promissory note, and the question

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[2] *Compare, Office of Disciplinary Counsel v Battistelli*, 193 W Va 629, 631; 457 SE2d 652 (1995).

mentions nothing about a letter or other writing by Lawyer disclosing the terms of the transaction that Client could countersign or acknowledge. Again, some candidates may note that the Michigan Rule differs from the ABA Model Rule in that it does not require "informed consent." Requiring informed consent would have required Lawyer to discuss risks and reasonable alternatives to the terms he proposed. See Model Rule 1.0(e).[3]

***(2) Client B:***

MRPC 1.8(a) does not apply to Lawyer's purchases at Hardware Barn. The comments to the Michigan and Model Rule 1.8 explain why these ordinary transactions do not constitute "business transactions" with a client under the rule:

> Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Nothing in the question suggests that Lawyer did anything but select merchandise and pay the prices marked on the items. Lawyer's purchases were standard commercial transactions and none of the strictures of MRPC 1.8(a) apply here.

***(3) Marketing via Mailers:***

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[3] ABA Model Rule 1.0(e) provides: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Lawyer may select coupon option 1. Option 2 violates the Rules of Professional Conduct. This question is answered by reference to MRPC 7.2(c) and MRPC 5.4(a).

Michigan Rule of Professional Conduct 7.2(c) provides, in pertinent part, that:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:
>
> > (i) pay the reasonable cost of advertising or communication permitted by this rule;

Option 1 is permissible under MRPC 7.2(c)(i). Lawyer is only paying the marketing firm the reasonable cost of the advertisement being mailed. Option 2, however, violates MRPC 7.2(c)(i) because the marketing firm is being paid a percentage of the fees paid by the client for the Lawyer's services. This, by definition, exceeds the reasonable cost of advertising or communication; the compensation to the advertising firm is tied not to its work, but to the fees generated by the flyer or coupon's use. This also constitutes a violation of MRPC 5.4(a) ("lawyer or law firm shall not share legal fees with a nonlawyer," except in certain circumstances not relevant here). Note that the increased cost to Lawyer for an exclusive placement in the mailer may not necessarily amount to a violation of MRPC 7.2(c). Such a higher payment may still fall within the "reasonable cost of advertising or communication," especially since the marketing firm will forego revenue from other attorneys in that mailer. But, this increased charge is not a violation of MRPC 5.4(a) as it is in no way tied to the attorney fees generated.

The question does not implicate MRPC 7.1 (false or misleading advertising, unjustified expectations, or unwarranted comparisons). Nor does the question involve a solicitation prohibited by MRPC 7.3(a); the mailing is a general advertising circular. Finally, the coupon(s) can be read to communicate Lon Lawyer's areas of practice, which is acceptable under MRPC 7.4.

## EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. **MRE 803(6) - Records of regularly conducted activity:** The e-mail memorandum is not within the scope of the "Business Record" exception. While that exception covers "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge," MRE 803(6), the record was a personal memo made and sent by the manager to himself for his personal use. It was not a record "kept in the course of a regularly conducted business activity" nor was it "the regular practice of that business activity to make that memorandum." *Id.* The e-mail memorandum is a non-routine record made by an individual manager for his personal reference rather than the routinely generated records of a business. *Central Fabricators, Inc. v Big Dutchman*, 398 Mich 352 (1976). Accord, *Solomon v Shuell*, 435 Mich 104, 117-121 (1990).

2. **Admissibility under MRE 803(24), the "Catch-all Exception":** The best argument supporting admissibility is MRE 803(24), the "catch-all" or "residual" hearsay exception. This exception may be applied where the evidence is hearsay not within any recognized exception, provided all of the following criteria are satisfied:

> (1) there are guarantees of trustworthiness equivalent to those in the enumerated exceptions;
>
> (2) the evidence is proof of one or more material facts;
>
> (3) the evidence is necessary, meaning it is more probative than any reasonable alternative;
>
> (4) admission of the evidence serves the interest of justice.

*People v. Katt*, 468 Mich 272, 279 (2003). In addition, by its terms, the exception requires notice to the opposing party so that the opponent can prepare to properly meet its admission. MRE 803(24). ["However, a statement may not be admitted under

this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particular of it, including the name and address of the declarant." MRE 803(24)]

All of the criteria are satisfied here. Equivalent trustworthiness exists in that the manager attended the meeting, made his original notes contemporaneously during the meeting, and modified the notes into memo format shortly thereafter, allowing little or no time for a memory lapse or fabrication. The circumstances are that he made the notes and memo for his personal use rather than to advance an agenda, as he did not disseminate the memo. The e-mail memo has further been verified as accurate and unchanged by forensic experts who recovered the electronic version. See *Katt*, 468 Mich at 291, n 11 (enumerating totality of the circumstances factors that serve as equivalent guarantees of trustworthiness to include the declarant's personal knowledge, the lapse of time between the event and the statement, the declarant's reputation for honesty, and whether the declarant appeared to carefully consider the statement). Accord, *Stadium Authority v Drinkwater*, 267 Mich App 625, 651-52 (2005).

The e-mail memo will also be used as proof of a material fact that is critical to Welles' case. *Katt*, 468 Mich at 292 (the statement "must be directly relevant to a material fact in the case"). It is also "necessary" in that there is *no* reasonable alternative for proving the subject matter of the meeting discussions, as no one else recorded this information. *Id.* at 293 ("essentially . . . a 'best evidence' requirement"). The manager (the declarant) is now deceased and there is no other memorialization of the subject matters covered in the meeting. And admission of the memo will serve the interest of justice, as embodied in MRE 102, by promoting "the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Finally, through discovery and pre-trial procedures, Welles gave notice to Kane of its intent to use the e-mail memo.

The e-mail memo fits no other enumerated exceptions, which makes it the perfect candidate for the catch-all exception.

However, some credit will be given for thorough and thoughtful discussions of other "near miss" exceptions, e.g., "present sense impression" or "recorded recollection."

## EXAMINERS' ANALYSIS OF QUESTION NO. 10

Darryl can be charged and likely convicted under Michigan's Home Invasion, First Degree statute. MCL 750.110a(2). This statute provides numerous ways a person may be convicted of Home Invasion, First Degree, including entering a dwelling without permission with the intent to commit a larceny, while armed with a dangerous weapon, or while another person is lawfully present. Darryl clearly entered Nick's dwelling. No facts suggest he did so with permission. Moreover, he was after Nick's TV and intended to pawn it. Darryl had a loaded revolver in his possession, clearly a dangerous weapon. Additionally, Nick was present in his own home. These facts taken together would prove Darryl guilty of Home Invasion, First Degree. It does not matter that Darryl took nothing.

Darryl can also be charged and likely convicted under Michigan's Felon in Possession statute, MCL 750.224f. This statute disqualifies convicted felons from possessing a firearm until, among other things, the person has successfully completed all conditions of parole. Here the facts indicate Darryl is a convicted felon, is still on parole, and had a loaded revolver in his possession. These facts support the conclusion that the applicable statute has been violated and that Darryl can be found guilty of Felon in Possession.

Darryl can also be convicted under Michigan's Carrying a Concealed Weapon statute, MCL 750.227. This statute prohibits the carrying of a firearm "concealed on or about his or her person" or in a vehicle occupied by the person. The facts support conviction here in many ways. Darryl was arrested with the gun underneath his jacket. He also had the gun in the vehicle. He had the gun concealed, before he went into Nick's home. Various ways of supporting a conviction are presented.

When Darryl saw and heard police behind him, he was obligated to stop his vehicle. When he failed to do so by speeding up and running stop signs and a red light, he committed the crime of Fleeing and Eluding a Police Officer under Michigan law, MCL 750.479a (1) and (2). Indeed, Darryl did not even stop his car for a mile and a half while police pursued him, it simply stalled out and stopped itself.

Darryl possessed the gun while committing the crimes mentioned above. Accordingly, Darryl could also be convicted under Michigan's so-called Felony Firearm statute, MCL 750.227b. This statute requires nothing more than carrying or having in one's possession a firearm when one commits or attempts to commit a felony. All the crimes mentioned above are felonies.

Finally, the chances of charging and convicting Darryl of Possession of Cocaine are much slimmer. Michigan's controlled substance possession statute, MCL 333.7403(1), states "[a] person shall not knowingly or intentionally possess a controlled substance" (emphasis added). Michigan's Criminal Jury Instructions also indicate knowledge of the presence of the substance is a required element. See CJI 2d 12.5. Here, Darryl was driving a car he had never driven, that he had never before been in, and that he had borrowed from a person described only as an "acquaintance." Moreover, the cocaine was not easily visible in the car, having been taped underneath a backseat floor mat. Indeed, police did not discover the cocaine until the car was impounded and inventoried. The knowledge element would be difficult to prove on the facts presented.

## EXAMINERS' ANALYSIS OF QUESTION NO. 11

The Members would have a complete defense to the tort action because their speech is constitutionally protected by the First Amendment to the United States Constitution. The Free Speech Clause of the Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech. . . ." The right to free speech protects one against constitutionally infirm legislation but the right to free speech can serve as a defense in state tort suits, including suits for the intentional infliction of emotional distress. *Hustler Magazine, Inc v Falwell*, 485 US 46, 50-51 (1988). Stated differently, if the Members' speech is protected under the First Amendment, that protection eliminates liability for the exercise of the Members' First Amendment right. That the Members could assert their right to free speech as a defense nevertheless requires further analysis to determine if the Members' words are entitled to constitutional protection.

It is clear from the facts, speech is at issue here and it is speech that is at the base of Mr. Jones's cause of action. Words on a picket sign are speech. The Members' demonstration did not physically disrupt the funeral nor trespass on it. Therefore, on this threshold question, speech is at the core.

Whether the First Amendment prohibits holding the Members liable for its speech turns largely on whether that speech is of public or private concern. Speech on matters of public concern is accorded the greatest protection under the Free Speech Clause because public speech on matters of public concern goes to the very core of open discourse and debate and goes to the essence of self-government. *Snyder v Phelps*, 562 US 443 (2011) citing *New York Times Co v Sullivan*, 376 US 254, 270 (1964) and *Garrison v Louisiana*, 379 US 64, 74-75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of first amendment values and is entitled to special protection." *Connick v Myers*, 461 US 138, 145 (1983) (internal quotations omitted).

However, not all forms of speech are accorded such high protection. Where matters of purely private significance are at issue, First Amendment protections are often less rigorous.

*Hustler*, at 56, citing *Dun and Bradstreet, Inc v Greenmoss Builders, Inc*, 472 US 749, 758-759 (1985).

The issue presented is whether the Members' speech is public or private in nature, with the former deserving of high--if not the highest--First Amendment protection and the latter receiving far less. "Speech deals with matters of public concern when 'it can fairly be considered as relating to any matter of political, social or other concern to the community,'" *Snyder* at 453 citing *Connick*, "or when it is 'a subject of legitimate news interest; that is a subject of general interest and of value and concern to the public.'" *Snyder, supra.*

Deciding whether speech is of public or private concern requires examination of the content, form and context of that speech.

Applying these principles to the facts at hand yields the conclusion that the content on the placard related to broad issues of interest to society at large, rather than matters of purely private concern. Although harshly, even venomously expressed, the words chosen related to America's war effort, the political and moral conduct of the nation, the fate of the nation, homosexuality in the military, and scandals involving the Catholic clergy. All are matters of public, not private, concern in their content.

As far as context is concerned, the Members' demonstration took place on public property, next to a public street, highly traditional places for demonstrations of this nature and the central locale in the public marketplace for the debate, discourse and exchange of public concerns. These precepts are not lessened because Jones's son's funeral was taking place nearby, nor because of the caustic nature of the Members' expressions.

Finally, even protected speech may be subject to reasonable, time, place and manner restrictions. Here, however, the Members followed the guidance of local authorities as to where the picketing could take place. The picketing was 1000 feet away from the church and did not include shouting, violence, profanity or interference with the funeral.

In sum, the Members were expressing public concern from a public place in a manner consistent with police directives in a peaceful and non-violent manner.

The Members have a legitimate defense under the Free Speech Clause of the First Amendment and cannot be held liable to Jones for his claim of intentional infliction of emotional distress.

## EXAMINERS' ANALYSIS OF QUESTION NO. 12

The Fifth Amendment to the United States Constitution states in pertinent part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ." Known as the double jeopardy clause, it provides various protections to the criminally accused. One of those protections --at issue here--is to be free from successive prosecutions for the same offense. *People v Smith*, 478 Mich 292, 299 (2002).

Without question, the protection against successive prosecutions embraces precluding retrial after a jury acquits the accused. *Ball v United States*, 163 US 662, 671 (1896). Similarly, where a trial court enters a directed verdict of acquittal, the accused is nonetheless acquitted and double jeopardy principles apply. *Fong Foo v United States*, 369 US 141 (1962). Therefore, whether acquitted by judge or jury, the accused has been nevertheless acquitted, the prosecution has been terminated, and retrial is barred by the clause. See *Smith v Massachusetts*, 543 US 462, 467 (2005).

The issue presented here is whether an "erroneous" acquittal stands in the same shoes for double jeopardy purposes as an acquittal without attendant shortcomings. The facts here indicate the trial judge erroneously added an element of proof to the prosecutor's burden. Then, having established that "element" as necessary, the court found the factual support of that element wanting. The trial court reasoned that, without proof of that element, the prosecution of David was fatally flawed and the trial court terminated the case before submission to the jury.

The question becomes, given the language and purpose of the clause, whether any of the surrounding circumstances prompting the trial court's decision matter for double jeopardy purposes.

*Michigan v Evans*, __ US __; 133 S Ct 1069; 185 L Ed 2d 124 (2013), answers this question in the negative. The Court based its decision in part on prior precedent which held that a judicial acquittal premised on a misconstruction of a criminal statute is an acquittal on the merits, barring retrial of the same offense. *Arizona v Rumsey*, 467 US 203, 211 (1984). *Fong*

*Foo, supra.* As *Evans* indicates, there is no meaningful distinction between a misconstruction of a criminal statute and the improper addition of a required element of proof. In the end, a finding of evidentiary deficiency by the Court was neither a procedural flaw nor a strictly legal determination.

Rather, the crux of the decision in *Evans* is that the trial court made a decision on the merits of the prosecution's proof and found the proof factually insufficient. Because evidentiary insufficiency was found as to David's guilt, this determination, despite wrongfully made, was nonetheless a binding determination, not subject to review or re-litigation.

Proper application of double jeopardy principles bars retrial of David on the charge of burning other real property. His counsel's motion should be granted.

## EXAMINERS' ANALYSIS OF QUESTION NO. 13

**(1) Claims against Porter and Mark:** The Bank can proceed against Porter for the full amount of the mortgage loan but cannot proceed against Mark.

A mortgage is a lien on real property securing performance of a debt. See *McKeighan v Citizens Commercial & Saving Bank*, 302 Mich 666 (1942). That debt may continue to exist even if the mortgagor no longer retains an interest in the property. See *In re Estate of Goodwin*, 362 Mich 456 (1961). ("The taking of a mortgage to secure the payment of a debt is, of course, a commonplace, the mortgage being mere security therefor, and only an incident or accessory to the principal debt." *Goodwin* at 458-59.) Finally, an individual who purchases an interest in mortgaged real property is not personally obligated to pay the debt unless he specifically agrees to assume the mortgage debt. See *Petz* v *Gaines*, 286 Mich 450, 453 (1938).

In this case, Porter received a $100,000 loan from the Bank. He is therefore liable for that $100,000. That Porter has since sold his interest in the property securing that debt does not shield him from liability. Further, the Bank cannot proceed against Mark personally for the debt because Mark purchased Porter's interest in the property without explicitly assuming the mortgage debt as he was unaware that the property was mortgaged.

**(2) Transfer of Interest:** Mark is now a tenant in common with Randy and Zeke. A tenancy in common is the default tenancy in Michigan involving co-owners, unless the conveyance explicitly states that it creates a joint tenancy, MCL 554.44, or the conveyance is to a married couple, which creates a tenancy by the entirety. *Tamplin v Tamplin*, 163 Mich App 1, 5 (1987). Each co-owner in a tenancy in common owns an undivided share of the entire property. *Kay Investment Company, LLC v Brody Reality No 1, LLC*, 273 Mich App 432, 441-442 (2006). A co-owner in a tenancy in common may freely transfer his interest without breaking the tenancy, and the new owner succeeds to the former owner's interest. See *Pellow v Arctic Mining Co*, 164 Mich 87 (1910).

In this case, Randy, Zeke, and Porter took the property as "equal co-owners" as described in the deed. The facts do not indicate that the deed's language explicitly created a joint tenancy, and this conveyance involved three friends, not a married couple. Randy, Zeke, and Porter thus took as tenants in common under MCL 554.44 and each had a freely transferable and equal undivided interest in the property. Porter sold his interest to Mark, who succeeded to Porter's interest and is now a tenant in common with Zeke and Randy.

**(3) Foreclosure:** Even though the Bank can proceed against Porter for the full amount of the mortgage, the Bank cannot foreclose on the property. First, if a mortgagor defaults on a mortgage loan, the mortgagee may foreclose only on the interest in the property securing the mortgage. See *Union Guardian Trust Co v Rood*, 261 Mich 188, 193 (1933). A mortgage given by one tenant in common on his individual interest does not affect the interests of the other tenants in common, because a tenant in common can only unilaterally encumber his own interest. See *Wright v Kayner*, 150 Mich 7, 14-15 (1884); *Moreland v Strong*, 115 Mich 211, 217-218 (1897).

Second, while an unrecorded mortgage is enforceable between the parties to the mortgage, it is not enforceable between the mortgagee and a third party that purchased the property for value and did not have either actual or constructive notice of the mortgage. See MCL 565.29, MCL 565.35; *Michigan Fire & Marine Ins Co v Hamilton*, 284 Mich 417, 419 (1938).

Here, the mortgagee, the Bank, had a mortgage loan secured explicitly by only *Porter's* interest in the property. Porter's interest in the property was that of a tenant in common, and a mortgage on only his interest in the property cannot encumber Randy's and Zeke's interests. Thus, the Bank cannot foreclose on Zeke or Randy's interests in the property because its lien never secured their interests.

Additionally, Mark purchased Porter's interest in the property for value, $30,000. He never had actual or constructive notice of the Bank's interest, because the Bank did not record its interest in the property and Porter did not tell Mark about the mortgage. Therefore, while the Bank can pursue

Porter for the full balance on the loan, it cannot foreclose on the property.

## EXAMINERS' ANALYSIS OF QUESTION NO. 14

***Original Will***: Although the original will was validly executed, Betty will not receive Danville under its terms. MCL 700.2807(1) provides that a divorce "revokes all of the following that are revocable: (*i*) A disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument". A will is a "governing instrument" for the purposes of this statute. MCL 700.1104. MCL 700.2806(a) defines a "disposition or appointment of property" as "a transfer of an item of property or another benefit to a beneficiary designated in a governing instrument."

Under MCL 700.2807, Dan and Betty's divorce revoked all revocable provisions of the will that transferred property or another benefit to Betty, the former spouse. The divorce therefore revoked the provisions of Dan's will that left Danville to Betty.

***Will Amendment***: Betty bears the burden of proof to admit the purported will amendment into probate. She must show that Dan had testamentary capacity as described in MCL 700.2501 and that the will meets the required formalities given in MCL 700.2502.

MCL 700.2501 states that an individual has sufficient mental capacity to make a will if that person has the ability to understand (1) that he is providing for the disposition of his property after his death, (2) the nature and extent of his property, (3) the general nature and effect of signing the will, and if that person (4) knows the natural objects of his bounty. The facts do not suggest that Dan, even though he was ill, lacked sufficient mental capacity to understand he was making a will, the nature and extent of his property, the natural objects of his bounty, or the act of signing the will. Betty may be able to meet her burden of proof to show that Dan had the required testamentary capacity under MCL 700.2501.

The document purports to amend Dan's will. To be considered part of a valid will, a will amendment is also subject to the formality requirements of MCL 700.2502. See *Palmer v Arnett*, 352 Mich 22, 25 (1958). Subsection 1 of MCL

700.2502 specifically provides in part that except as provided by subsection (2), a will is valid only if it is (a) in writing; (b) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) signed by at least two individuals, each of whom signed within a reasonable time after he or she witnessed either the signing of the will or the testator's acknowledgment of that signature or acknowledgment of the will. In the instant case, the purported will amendment is in writing, and Dan signed and dated the document, but there were no witnesses. Therefore, that will amendment was not incorporated into Dan's original, valid will under subsection 1.

Subsection 2 of MCL 700.2502, provides that a will that does not comply with subsection 1 is valid as a holographic will, whether or not witnessed, "if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting." Although Dan signed the will amendment and although it is dated, no portion of the document is "in the testator's handwriting." Consequently, that purported will amendment does not meet the definition of a valid holographic will, and therefore it is not incorporated into Dan's original, valid will under subsection 2.

Betty might argue that the document constitutes a will under MCL 700.2503. MCL 700.2503 provides that even if a document fails to comply with MCL 700.2502, "the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will" or an amendment of the decedent's will. A court can treat the "Will Amendment" as if it was executed in compliance with MCL 700.2502 if Betty can show, by clear and convincing evidence, that Dan intended the document to be his will or an alteration of his will. She may succeed, given that Betty clearly labeled the document as a will amendment and Dan did sign and date it. Clear and convincing evidence, however, is a high standard for Betty to meet.

## EXAMINERS' ANALYSIS OF QUESTION NO. 15

**Tessa**: The general rules regarding bailments were provided by the Court of Appeals in *Orton v Markward & Karafilis, Inc*, 83 Mich App 548, 551 (1978):

A bailment requires the delivery of personal property in trust. *In re George L Nadell & Co, Inc*, 294 Mich 150, 154 (1940). In order to constitute a sufficient delivery of the subject of the bailment, there must be a full transfer to the bailee so as to exclude the possession of the owner and all other persons and to give to the bailee the sole custody and control thereof. 8 Am Jur 2d, Bailments, §56, p 961. As a general rule, the creation of a bailment requires the possession and control over the subject matter pass from the bailor to the bailee. 8 Am Jur 2d, Bailments, §54, p 960.

Here, Tessa took Peter's watch under a bailment relationship, as Peter left his watch in Tessa's care without intent to transfer title. Tessa merely had possession and control of the watch while she attempted the repair. Therefore, Tessa became the bailee of the property of Peter, the bailor.

There are three general classifications of bailment. The characterization of the relationship determines the level of care the bailee is required to exercise toward the bailor's property: "(1) Those for the sole benefit of the bailor; (2) those for the sole benefit of the bailee; and (3) those for the benefit of both parties." *Godfrey v City of Flint*, 284 Mich 291, 295 (1938). The bailment here was clearly for the benefit of both parties. Peter initiated the arrangement by bringing his watch to Tessa's shop to have it repaired. Tessa agreed to repair the watch in exchange for $100. Both parties received, or intended to receive, a benefit from the bailment relationship.

When a bailment is initiated for the benefit of both parties, the bailee is "bound to exercise ordinary care of the subject-matter of the bailment, and is liable for ordinary negligence." *Godfrey*, 284 Mich at 298. In this case, Peter is likely to succeed in an action for negligence against Tessa

because she owed him a duty of ordinary care, which was likely breached by placing Peter's valuable watch in a briefcase with a known hole. It was foreseeable that the watch could fall out of the briefcase through its hole and be lost. Therefore, Tessa is likely responsible for the lost watch.

**Mitt**: Peter could also maintain a lawsuit against Mitt for the return of the watch. In Michigan, the disposition of all lost property is governed by the Lost Property Act, MCL 434.21, *et seq.* As provided in part by that act:

> A person who finds lost property shall report the finding or deliver the property to a law enforcement agency in the jurisdiction where the property is found.

MCL 434.22(1). The act further provides that "[a]ll property of major value shall be returned to the legal owner when the law enforcement agency is reasonably satisfied of that ownership. If the legal owner is not located and after 6 months from the date of the notice as prescribed in section 5, the property shall be disposed of pursuant to this act." MCL 434.24(7).

Because Mitt did not report his discovery of Peter's watch to the local authorities, his attempt to sell the watch prior to the six-month waiting period required under the act for property of major value like Peter's expensive watch, was in violation of the law. Peter could maintain a lawsuit for return of the watch from Mitt, and he would likely prevail in court. The act provides legal owners with superior claim to all found property in the state. Upon sufficient proof of his legal ownership of the watch, Peter would easily prevail on his claim in a lawsuit against Mitt.